BORA LASKIN LAW LIBRARY
3 1761 03325 2248

DRAFT

Canadian Constitutional Law

VOLUME 1

P. Macklem
R.C.B. Risk
C.J. Rogerson
K.E. Swinton
L.E. Weinrib

1993
EMOND MONTGOMERY PUBLICATIONS LIMITED
TORONTO, CANADA

BORA LASKIN LAW LIBRARY
SEP 14 1993
FACULTY OF LAW
UNIVERSITY OF TORONTO

DRAFT

Canadian Constitutional Law

VOLUME 1

P. Macklem
R.C.B. Risk
C.J. Rogerson
K.E. Swinton
L.E. Weinrib

1993
EMOND MONTGOMERY PUBLICATIONS LIMITED
TORONTO, CANADA

Digitized by the Internet Archive
in 2019 with funding from
University of Toronto

https://archive.org/details/canadianconstitu01unse_0

Table of Contents

DRAFT VERSION OF CHAPTERS 1 THROUGH 13 — CANADIAN CONSTITUTIONAL LAW

INTRODUCTION

Chapter One Introduction to the Canadian Constitution 1

I. What Is a Constitution? 1
D.V. Smiley, Canada in Question: Federalism in the Eighties, 3rd ed. 1
K.G. Banting & R. Simeon, "Introduction The Politics of Constitutional Change" 2
II. Components of the Canadian Constitution 4
A. Parliamentary Supremacy 4
A.V. Dicey, Introduction to the Study of the Law of the Constitution, 8th ed. . . . 4
B. Federalism 5
D.V. Smiley, The Federal Condition in Canada 5
C. Constitutional Conventions 7
R. M. Dawson, The Government of Canada, 6th ed. 7
Reference Re Resolution to Amend the Constitution (Patriation Reference) 7
D. The 1982 Constitutional Amendment 9
K. Banting and R. Simeon, "Federalism, Democracy and the Constitution" 9
E. Post-1982 Events 15
A.C. Cairns, Charter versus Federalism 15
A.C. Cairns, "The Charter, Interest Groups, Executive Federalism, and Constitutional Reform" 19
Canadian History: An Aboriginal Perspective 21

Chapter Two Constitutional Interpretation 27

P. Bobbitt, "Methods of Constitutional Argument" 27
A. Prentice et al., Canadian Women: A History 32
Reference Re Meaning of the Word "Persons" in Section 24 of the British North America Act, 1867 34
Edwards v. A.G.-Canada 38
Note: Constitutional References 43
Note: Progressive Interpretation 43

FEDERALISM

Chapter Three **Confederation** 47

G. Stevenson, Unfulfilled Union, 3rd ed. 47
Note 53
J.D. Whyte, "Constitutional Aspects of Economic Development Policy" 53
A. Silver, The French-Canadian Idea of Confederation, 1864-1900 55

Chapter Four **The Late Nineteenth Century: The Canadian Courts Under the Influence** 61

Citizens Insurance Company of Canada v. Parsons 62
Note 69
Russell v. The Queen 70
Hodge v. The Queen 74
Note 78
A.G. Ontario v. A.G. Canada (The Local Prohibition Reference) 81
Note 88

Chapter Five **The Early Twentieth Century: The Beginnings of Economic Regulation** 91

Lord R.B. Haldane, "Lord Watson" 91
In Re The Board of Commerce Act, 1919 & The Combines and Fair Prices Act, 1919 95
Fort Frances Pulp and Paper Company v. Manitoba Free Press Company 100
Note 103
Toronto Electric Commissioners v. Snider 104
The King v. Eastern Terminal Elevator Co. 107
Note 111
H. E. Smith, "The Residue of Power in Canada" 111
J.R. Mallory, "Social Credit and the Federal Power in Canada" 113
A. Cairns, The Judicial Committee and Its Critics 114
F.E. LaBrie, "Canadian Constitutional Interpretation and Legislative Review" 116

Chapter Six **The 1930s: The Depression and the New Deal** 119

Proprietary Articles Trade Association v. A.G. Canada 119
Reference Re The Regulation and Control of Aeronautics in Canada 121
Reference Re Regulation and Control of Radio Communication in Canada ... 123
Note 125
A.G. Canada v. A.G. Ontario (Labour Conventions) 129
A.G. Canada v. A.G. Ontario (The Employment and Social Insurance Act) ... 133

A.G. British Columbia v. A.G. Canada (The Natural Products Marketing Act). 135
Note 137
F.R. Scott, "Some Privy Counsel" 141

Chapter Seven The Modern Canadian State and Federalism 143
K. Norrie, R. Simeon and M. Krasnick, Federalism and the Economic Union . 143

Chapter Eight Principles of Constitutional Interpretation 151
I. Characterization of Laws 151
A. Pith and Substance 151
K. Swinton, The Supreme Court and Canadian Federalism 151
Starr v. Houlden 154
Note 173
W.R. Lederman, "Classification of Laws and the British North America Act" . 174
R. Simeon, "Criteria for Choice in Federal Systems" 180
B. Necessarily Incidental: The Ancillary Doctrine 186
General Motors of Canada Ltd. v. City National Leasing 187
C. Double Aspect 190
II. Paramountcy 190
Ross v. Registrar of Motor Vehicles 191
Multiple Access Ltd. v. McCutcheon 196
Notes and Questions 204
Bank of Montreal v. Hall 205
Notes and Questions 208
III. Interjurisdictional Immunity and Reading Down 209
McKay v. The Queen 210
Notes and Questions 215
Commission du Salaire Minimum v. Bell Telephone Co. of Canada 215
Notes 220
Commission de la Santé et de la Sécurité du Travail v. Bell Canada 221
IV. The Constitution and Policy Instruments 232
A. Taxation 232
B. Spending 233
C. Delegation 233
D. Intergovernmental Agreements 234

Chapter Nine Peace, Order and Good Government 235
Note on the Historical Development of the P.O.G.G. Power 235
K. Swinton, The Supreme Court and Canadian Federalism:
The Laskin-Dickson Years 237
Reference Re Anti-Inflation Act 242

Note: The Anti Inflation Case and Extrinsic Evidence 265
Note: Emergency Legislation After the Anti-Inflation Reference 266
Note: The National Concern Doctrine After Anti-Inflation 267
R. v. Crown Zellerbach Canada Ltd. 268
Note 280
Friends of the Oldman River Society v. Canada (Minister of Transport) 281
Note 286
J. Lucas, "Note on Crown Zellerbach" 286
Note: Proposed Reform of the P.O.G.G. Power 288

Chapter Ten Economic Regulation 291

I. The Constitution and the Economy 291
M.J. Trebilcock, "Federalism and the Canadian Economic Union" 291
K. Swinton, The Supreme Court and Canadian Federalism: The Laskin-Dickson Years 293
II. Provincial Powers over Economic Regulation 295
J.R.S. Prichard with J. Benedickson, "Securing the Canadian Economic Union: Federalism and Internal Barriers to Trade" 295
Note 297
Carnation Co. Ltd. v. Quebec Agricultural Marketing Board 298
A.G.-Manitoba v. Manitoba Egg and Poultry Association 302
P. Weiler, "The Supreme Court of Canada and Canadian Federalism" 310
Note 313
Re Agricultural Products Marketing Act 313
III. Federal Powers Over Economic Regulation 318
A. Regulation of Interprovincial and International Trade 318
The Queen v. Klassen 318
Note: Murphy and Canadian Pacific Railway Co., [1958] S.C.R. 626 321
B. Laskin, "Note on The Queen v. Klassen" 321
Caloil Inc. v. A.G.-Canada 322
Note 323
B. General Regulation of Trade 324
K. Swinton, The Supreme Court and Canadian Federalism: The Laskin-Dickson Years 324
Labatt Breweries of Canada Ltd. v. A.G.-Canada 326
Food and Drug Regulations 337
Notes 338
General Motors of Canada Ltd. v. City National Leasing 340
Note 350
IV. Proposals for Change 350
Black and Co. v. Law Society of Alberta 351
Report of the Special Joint Committee of the Senate and the House of Commons, A Renewed Canada 354
Further Reading 356

Chapter Eleven Natural Resources 357

Richard Simeon and Ian Robinson, State, Society and the Development of Canadian Federalism 357
Canadian Industrial Gas and Oil Ltd. v. Government of Saskatchewan 359
Notes 366
Central Canada Potash Co. Ltd. v. Government of Saskatchewan 367
Note: Proprietary Rights 369
Reference re Proposed Federal Tax on Exported Natural Gas 370
Note: Section 92A 381
Note: Offshore Minerals 381

Chapter Twelve Morality and the Criminal Law 383

I. Federal Powers Over Criminal Law 383
Reference re Validity of Section 5(1) of the Dairy Industry Act 383
(Margarine Reference) 383
Notes 385
Note: The Limits on the Federal Criminal Power 385
Note: The Definition of Criminal Law Under the Charter 386
Thomson Newspapers Ltd. v. Canada (Director of Investigation and Research, Restrictive Trade Practices Commission) 386
II. Provincial Power to Regulate Morality and Public Order 391
Re Nova Scotia Board of Censors v. McNeil 391
Note: Standing to Bring Constitutional Challenges 398
A.G. Canada v. Dupond 399
K. Swinton, "Bora Laskin and Federalism" 404
Westendorp v. The Queen 406
Rio Hotel Ltd. v. New Brunswick (Liquor Licensing Board) 409
Notes 413
R. v. Morgentaler 414

Chapter Thirteen The Judicial Function: Introduction 419

Labour Relations Board of Saskatchewan v. John East Iron Works Ltd. 424
Reference Re Residential Tenancies Act 428
Note 437
Sobeys Stores Ltd. v. Yeomans and Labour Standards Tribunal (N.S.) 438
Crevier v. Quebec (Attorney General) 447
McEvoy v. Attorney General of New Brunswick and Attorney General of Canada 451
Note on Proposed Amendment of Section 96 454
Note on the Federal Court of Canada and Its Jurisdiction 455